

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ROBERT JACKSON,

Plaintiff,

v.

21 CV 5037 (JPO)

AMERICAN CIVIL LIBERTIES  
UNION, INC. and LUCIA TIAN, in  
her individual and  
professional capacity,

Defendants.

Oral Argument  
(via Microsoft Teams)

New York, N.Y.  
August 21, 2024  
2:35 p.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

TAYLOR CRABILL  
Attorney for Plaintiff

KAUFF MCGUIRE & MARGOLIS, LLP  
Attorneys for Defendants  
BY: MICHELE A. COYNE

1 (Case called)

2 MR. CRABILL: Good afternoon, your Honor, this is  
3 Taylor Crabill for the plaintiff, Robert Jackson.

4 THE COURT: Good afternoon.

5 MS. COYNE: Good afternoon, your Honor, this is  
6 Michele Coyne from Kauff McGuire & Margolis for defendants, the  
7 American Civil Liberties Union and Lucia Tian.

8 THE COURT: Good afternoon.

9 Thank you all for joining. I'm sorry we have had to  
10 put this off a couple of times. But we are here for argument  
11 on defendants' motion for summary judgment in this case. I  
12 have reviewed the papers, but I wanted to give you all a chance  
13 to take whatever time -- I was thinking 15 or 20 minutes -- to  
14 present any arguments you'd like to make on the motion.

15 As the movant, Ms. Coyne, you can begin.

16 MS. COYNE: Thank you, your Honor.

17 May it please the Court, defendants are entitled to  
18 summary judgment on all of the plaintiff's claims.

19 And I just want to sort of start out by setting where  
20 this case is, which is, it's a case involving a short-term  
21 probationary employee. He was hired and fired by the same  
22 person in the space of fewer than 10 months. He was only  
23 assigned two projects in his entire tenure and produced  
24 virtually no useable work.

25 The record in this case is thick, in light of what I

1 have just said in terms of what the facts are. But most of the  
2 briefing and most of plaintiff's briefing really goes to the  
3 point of, he disputes the performance feedback that he  
4 received.

5 A lot of the briefing has to do with, was he really  
6 qualified, was he misled as to what the role was supposed to  
7 be? It was supposed to be one thing and it was another.  
8 Whether the ACLU's expectations were clear or reasonable,  
9 whether the deadlines were real ones or they could be moved,  
10 and things of that nature.

11 But of course it's not the Court's role to parse  
12 whether the performance feedback was wise or fair, but whether  
13 there is evidence here of discrimination or retaliation.

14 And I will start with retaliation, which really  
15 centers on the plaintiff standing in front of a group with  
16 eight other people, not speaking, to raise issues around the  
17 ACLU. Presuming that he has established a *prima facie* case,  
18 our position is that he cannot establish pretext.

19 Again, a lot of this has to do with one thing, which  
20 is temporal proximity. So when somebody is an employee for 10  
21 months and begins displaying poor performance immediately,  
22 yeah, things are close in time. However, the case law is  
23 clear, in our view, that temporal proximity alone is not  
24 enough.

25 In addition, here we see that the criticism of his

1 performance started almost immediately. So he starts in  
2 October of 2019. By November of 2019, he has already sent a  
3 message saying, I recognize this isn't great performance by me.  
4 In employment relationships for the performance to already be a  
5 problem within a month is pretty fast.

6 There are other messages also that establish those  
7 performance issues, and why that's relevant here is that when  
8 the performance feedback predates any protected activity, which  
9 surely it does here, it undermines the notion of pretext.

10 Secondly, the temporal proximity here, he relies a lot  
11 on comments that he attributes to Lucia Tian, words to the  
12 effect of, keep quiet, be the cooler head. Our view is that  
13 that's not -- while we have to assume that that happened for  
14 purposes of this motion, that that's not evidence of anything.  
15 He admits, after meeting with Lucia, that he felt supported,  
16 that she had been supportive of him, that everyone had been  
17 supportive of him, so he certainly didn't see it as evidence of  
18 anything, and it's not.

19 THE COURT: What is your explanation of those  
20 comments? First of all, I am not sure -- I didn't go back and  
21 check if that comes from a deposition or a document.

22 So after the Southern Convening, he meets with his  
23 boss, Ms. Tian, and she instructs him to keep quiet, be the  
24 cooler head in the room, and keep calm.

25 Is that from a deposition?

1 MS. COYNE: That's his testimony as well as in the  
2 complaint, yes. Of course we dispute those comments, but we  
3 understand that for purposes of this motion we will have to  
4 assume that they happened.

5 However, part of his testimony also is that after the  
6 conversation -- and, as I said, we dispute that's what was  
7 said -- but what's certainly true and what he testified to is  
8 that after the conversation, whatever happened, that he sends  
9 an email talking about how supportive and, frankly, honored he  
10 feels. So whatever about the substance of that conversation,  
11 he certainly took it as I'm being supported and I'm being  
12 honored.

13 In addition, we cite cases in the briefs about the  
14 offer that he received of the lower position, the lower  
15 position that he ultimately took, and cases that go to the  
16 point of when somebody is a probationary employee and surely  
17 could have been terminated without further recourse, the fact  
18 that the ACLU in this case attempted to continue his employment  
19 cuts against a finding of retaliation.

20 Finally -- and again there is cases cited in the  
21 briefs -- as I said, he stood on stage, or at least stood in  
22 front of the room with eight other people, some of whom were  
23 ACLU employees of what they call the national office and some  
24 of whom were employees of what are called affiliates of the  
25 ACLU. But with respect to others who were national office

1 employees who engaged in the same exact behavior as Mr. Jackson  
2 did, meaning standing in front of a room, there is citations in  
3 the record of good things that happened to them thereafter,  
4 having engaged in the same behavior, one receiving a promotion  
5 and another getting a raise.

6 If I can turn now to the discrimination case, I think  
7 the most important point here, and I don't really think the  
8 plaintiff has answered it, is the same actor inference. While  
9 we recognize that that's not a mandatory inference for the  
10 Court to draw, we think in this circumstance it's a very strong  
11 inference for a couple of reasons.

12 First of all, again, it's a very short period of time.  
13 He is hired and within a couple of months he is saying, well,  
14 they are discriminating against me. Ms. Tian was responsible  
15 for his hiring and was also a large contributor to the decision  
16 to terminate him, a decision that was communicated to him  
17 around eight months after he started. So where there is a very  
18 short period of time, we think that there is a very strong  
19 same-actor inference to be drawn here.

20 As I said, I don't really think the plaintiff answers  
21 this, the notion that Ms. Tian may have suddenly decided to  
22 adopt racial animus within those few months. And we cite,  
23 again, to a case in the brief, the *Paul* case, where the Court  
24 said, well, seven months doesn't make sense that somebody could  
25 have adopted a discriminatory animus in that short period of

1 time. It's even less here.

2 The same legitimate nondiscriminatory reasons apply  
3 here as they do in the retaliation case, although they are not  
4 addressed in the plaintiff's briefing, but there is really no  
5 real dispute here that Ms. Tian was responsible for the hiring.  
6 They have admitted in the 56.1 counter statement that she is  
7 the one that submitted the request that he be hired. There is  
8 some discussion in the briefing that maybe, even though she  
9 hired him, maybe she really didn't want to. That's not borne  
10 out in the record whatsoever.

11 David Oliver, who testified about that, admitted in  
12 his deposition, and it's cited in our brief, that he didn't  
13 know that to be the case.

14 The plaintiff assumes that she wanted a different  
15 candidate and incorrectly identifies an Asian candidate by the  
16 wrong name as being the person he suspects she wanted to hire.  
17 The reality is that she was the hiring manager, she requested  
18 the hiring and also contributed to the termination decision.

19 Finally, I'll just note that the plaintiff has  
20 withdrawn the aiding and abetting claim against Ms. Tian, so I  
21 think that's a moot point.

22 THE COURT: Let me just clarify the hiring and  
23 termination decision maker. Was she clearly the individual who  
24 hired Mr. Jackson, or was that a number of people involved in  
25 the decision to hire initially?

1 MS. COYNE: Your Honor, frankly I think it's both.  
2 There were a committee or a group of people who were  
3 responsible for interviewing the plaintiff, and I don't think  
4 there is any dispute about this. There were a group of people  
5 who were involved in rating the candidates. Ultimately,  
6 though, the decision is made by Ms. Tian.

7 We cited also in our briefs to her contemporaneous  
8 emails saying, I really want to get Rob in here. He seems  
9 really qualified. He cares a lot about our work. There is no  
10 dispute that she is the one that made the request to HR to hire  
11 him.

12 So like lots of hiring decisions, there are people who  
13 interview a candidate who give their input, but there is no  
14 real genuine dispute here that she is the one that made the  
15 decision to hire him.

16 THE COURT: In terms of the termination, again, going  
17 back to that, she is the one who submits the memo. She has  
18 this committee. And you would say that the record shows that  
19 that committee is making a recommendation to her?

20 MS. COYNE: So they are all ranking the candidates  
21 that they interview and they are all contributing to that. Her  
22 view is consistent with that of the others, which is, he is the  
23 one that should be hired. It can be sort of difficult -- as I  
24 said, in most circumstances not just one person contributes to  
25 the decision. People have input. They give opinions. But



1 ultimately it's her decision.

2 THE COURT: And with respect to the termination, same  
3 question. Who is involved in the termination, and is there one  
4 person who is the ultimate decision maker?

5 MS. COYNE: Ultimately, it's her decision to make but  
6 like in all organizations, she is consulting with other people.  
7 At that point he was reporting to a different supervisor,  
8 Allison Kelley. Ms. Kelley then reported up to Ms. Tian. And  
9 of course HR is involved in those discussions and those  
10 decisions as well.

11 If you look at the case, the *Jones v. Yonkers* case  
12 that we cited in our brief, the same-actor inference is not  
13 just dependent on somebody having sole authority, and there are  
14 very few of us that have sole authority to hire and fire people  
15 without anybody else weighing in, but it applies when they have  
16 input into the hiring and firing decision that is significant,  
17 which Ms. Tian certainly did. So she doesn't have to be the  
18 sole person.

19 THE COURT: Who recommended his termination? Was it  
20 Horowitz, Kelley, and Ms. Tian?

21 MS. COYNE: Technically speaking, I suppose, there is  
22 two different decisions here. When he is hired, he is a  
23 probationary employee. And then there is a decision made by  
24 Ms. Tian that he's not going to pass probation. I say it is  
25 sort of technically a separate decision because he is not then

1 fired. She makes the evaluation -- maybe evaluation is the  
2 word I should use -- that he is not going to pass probation.  
3 That is sort of step one.

4 The next decision is, what are we going to do about  
5 it? And in that instance they made the decision to offer him  
6 the other role, the lower-level role.

7 Similarly, the sort of mirror of that is, at the end  
8 of several more months, when he is reporting to Ms. Kelley,  
9 Allison Kelley makes the decision again, he is not going to  
10 pass probation. So now, again, we have to make a decision  
11 about what we do about that, and in that instance the decision  
12 is to terminate him, but that's a decision ultimately that  
13 Ms. Tian is making, again, with consultation with other people.

14 THE COURT: Is there evidence in the record of anyone  
15 involved in those consultations saying, we should not terminate  
16 him or decline to let him pass probation?

17 MS. COYNE: No.

18 THE COURT: I know there is somebody named Ms. Eigo.  
19 I am not sure how you say her name.

20 MS. COYNE: That's right, Eigo.

21 THE COURT: Ms. Eigo seems to be someone who expressed  
22 reservations about his termination, perhaps. Was she on the  
23 same level as he was? What was her connection to him in the  
24 first role and the second role? I gather she was in the second  
25 role?

1 MS. COYNE: Right. So Ms. Eigo did not have any --  
2 she was deposed. She was in a role similar to his. She didn't  
3 have any supervisory authority over him. And there is also  
4 lots of testimony in the record that she didn't really know  
5 what he was doing. She didn't have any reason to know what  
6 specifically he was working on. She speaks about having seen  
7 his computer screen and it having looked like something that  
8 she has worked on. So she wasn't in a position to make any  
9 decision, recommend any decision. She was a peer.

10 THE COURT: Thank you.

11 Mr. Crabill, I want to give you a chance to respond  
12 however you see fit.

13 MR. CRABILL: Sure, your Honor. Thank you for the  
14 arguments today and for conducting them virtually.

15 The record is clear that there is at least, at the  
16 very, very least, a question about whether the adverse actions  
17 taken against Mr. Jackson were motivated by discriminatory or  
18 retaliatory intent.

19 Opposing counsel just cited to some evidence in the  
20 record, but has excluded references to other pieces of evidence  
21 that would contradict or go against what defendants are putting  
22 forward as their explanation for their reasons for the demotion  
23 of Mr. Jackson and his ultimate termination. And this evidence  
24 could clearly be interpreted by a jury to demonstrate  
25 discriminatory and retaliatory animus.

1           If we go first to Mr. Jackson's retaliation claims,  
2           there is a stark contrast in how Mr. Jackson was treated prior  
3           to his initial complaints at the Southern Convening in December  
4           of 2019, and the treatment of him afterwards.

5           Opposing counsel has pointed to supposed performance  
6           issues prior to the initial protected activities at the  
7           Southern Convening, but there is evidence in the record that  
8           Mr. Jackson was praised for his work on the first phase of the  
9           work-study project, which is the main project he was working on  
10          prior to and after the Southern Convening, that he was the one  
11          that actually set deadlines related to the project that were  
12          approved by the stakeholder, Karolyn Bonfanti, and it was  
13          Bonfanti that had to push deadlines related to her own work  
14          schedule and inability to work on the project and review  
15          Mr. Jackson's work.

16          Again, there is clear evidence that goes against  
17          defendants' claims that these performance issues popped up  
18          before he engaged in these protected activities.

19          They cite only to one Slack message where he mentions  
20          one part of his work, but if you look at the overall record  
21          related to that first phase of the work-study project and his  
22          work prior to his engaging in protected activities at the  
23          Southern Convening, it paints an overall positive picture of  
24          his work performance.

25          THE COURT: There is clearly evidence that Ms. Tian

1 and Mr. Horowitz were talking about the fact that he was  
2 incapable of doing some of the technical stuff that they hoped  
3 he was doing, and he was behind on the work, and that he was  
4 missing deadlines.

5 And then by December or January, they are saying to  
6 each other, we have got to find something else for him. We  
7 clearly hired someone who doesn't have the technical skills to  
8 do this job.

9 Are you saying that that was pretextual?

10 MR. CRABILL: That was pretextual and those sort of  
11 critiques were happening after the Southern Convening and these  
12 additional protected activities.

13 The work-study project that is the thing that  
14 defendants cite to as supposed performance issues and why he  
15 was ultimately demoted was broken up into two phases. The  
16 first part of the work-study project was sending out a survey  
17 to ACLU employees, collecting data. And he worked with Karolyn  
18 Bonfanti to do that and ultimately was praised for that.

19 The more technical parts of the project that came in  
20 connection with the work-study project, the work-study report,  
21 was later, was after -- was mainly after the protected  
22 complaints at the Southern Convening and then the follow-ups  
23 thereafter, right.

24 At one point even in, I believe, Slack communications  
25 between Horowitz and Tian, Horowitz is stating to Tian, hey,

1 listen, I think it could have been Bonfanti that was the cause  
2 of these delays, right?

3 Ultimately, Mr. Jackson didn't know about these  
4 deadlines until Bonfanti sprung them on him at the last second.  
5 Instead of sort of investigating and looking into, hey, was Rob  
6 at fault here, was Karolyn at fault here, Tian moves  
7 immediately to sort of blame this on Mr. Jackson and then use  
8 that as a basis to justify the adverse actions that they  
9 ultimately took against him.

10 It's clear then, following the Southern Convening, in  
11 Ms. Tian's private communications, in Slack messages, that she  
12 was upset by what he had done, right. There was the initial  
13 comment in the meeting with Mr. Jackson about, hey, be quiet.  
14 Let other people talk, kind of let this go.

15 And he didn't do that. He continued to speak out. He  
16 continued to follow up with HR about the initiatives that him  
17 and his colleagues proposed at the Southern Convening, and Tian  
18 was annoyed by it. And the record is clear. It's clear in  
19 those Slack messages and it's clear in her testimony that she  
20 was upset that it was causing Rob to be distressed, and she was  
21 upset that it was causing distress to her team.

22 And it's not only that portion of the evidence, but  
23 also supported by Mr. Jackson's colleagues, who observed the  
24 change in treatment of him before and after the Southern  
25 Convening, noticing that Tian tried to shut down any sort of

1 discussions about the Southern Convening and what was discussed  
2 there during those analytic meetings, and also the way that she  
3 was supervising him. So there is clear evidence going to that  
4 retaliatory intent. At the very least, a jury could look into  
5 to that and say, these messages demonstrate that this demotion  
6 was motivated by a retaliatory intent.

7 THE COURT: When you say these messages, could you  
8 tell me exactly what you're talking about.

9 MR. CRABILL: Sure. One second, your Honor.

10 If you look in plaintiff's response to paragraph 27 of  
11 defendants' local rule 56.1 statement of facts, on page 15 of  
12 the counter statement it specifically references these private  
13 one-on-one Slack messages with Horowitz from 3:30 p.m. on  
14 December 18, 2019, in which he stated to Horowitz: "This  
15 Southern Convening thing is turning into a whole thing."  
16 That's Exhibit HH of plaintiff's exhibits.

17 Tian then goes on to say the -- she goes on to her  
18 admit that her statement was related to "a lot of consternation  
19 among the staff at the ACLU for what happened around the  
20 Southern Convening." That's from Tian deposition transcript at  
21 page 108, lines 6 to 17.

22 Tian also testified: "I believe at this point I had  
23 also had the conversation with Rob and understood his concerns  
24 and understood that he was upset, so I wanted to -- I think  
25 that's an expression of the fact that, you know, this event was

1 causing both individuals on the team, specifically Rob, to be  
2 upset, and also further discussion in the organization."

3 That's at Tian's transcript, page 108, lines 6 to 25:

4 Tian then followed up the Slack messages to Horowitz  
5 with a message of a screaming face emoticon that she used to  
6 express her, quote, horror that members of the analytics team  
7 were, quote, upset by the events of the Southern Convening.  
8 That's all outlined --

9 THE COURT: You can almost read some of those messages  
10 as her being upset with the situation that led people to  
11 complain. In other words, was she sort of expressing upset  
12 that we are in this situation where people have to express  
13 frustration about the challenges within the ACLU of getting and  
14 maintaining the kind of racially diverse workforce that we  
15 want, and that she was upset about that, about the same thing  
16 they were complaining about.

17 MR. CRABILL: That could be one possible  
18 interpretation by a fact finder.

19 Another interpretation could certainly be that this is  
20 related to the fact that Rob is continuing to talk about this  
21 during his meetings with other analytics employees. There are  
22 specific references here to how it is causing a problem with  
23 members of her team.

24 There is a very clear understanding that she was upset  
25 by how Rob's actions at the Southern Convening and afterwards



1 were causing her team to be disrupted.

2 Looking even at additional parts of her testimony, she  
3 admits exactly that, that she was "not happy with the fact that  
4 the event then caused indirect impact on my own staff that  
5 caused my staff to be upset."

6 THE COURT: But there is a distinction between being  
7 upset about someone for complaining about discrimination and  
8 being upset with someone for complaining in a way that disrupts  
9 the work force and/or prevents a department from getting their  
10 work done, right?

11 MR. CRABILL: Sure, your Honor. But this was a  
12 situation -- it wasn't just a situation where, let's say,  
13 Mr. Jackson had not been on the team, that there still would  
14 have been a disruption within the team.

15 It was the fact that Rob was on her team and part of  
16 those conversations, part of those complaints, part of them  
17 continuing those complaints and discussions at the ACLU, with  
18 human resources, and with his coworkers that caused that sort  
19 of disruption and caused what was happening with her team.  
20 That's clear from declarations submitted by Mr. Jackson's  
21 coworkers about the fact that Ms. Tian was trying to shut him  
22 down when he was discussing those things.

23 Sorry. I'm just reviewing my notes. One second, your  
24 Honor.

25 Plus, counsel also cited to, temporal proximity was

1 not enough. Of course there was a short temporal proximity  
2 here between the protected activities, specifically the  
3 complaints made during the Southern Convening in mid December  
4 2019, and then the ultimate demotion just weeks later.

5 And it wasn't just weeks between the initial protected  
6 activity. Like I mentioned, Mr. Jackson continued to engage in  
7 these protected activities, which was what was causing the  
8 disruption with Ms. Tian's team that we just discussed. The  
9 idea that his case is based only on temporal proximity is just  
10 not true, based on the record.

11 THE COURT: Any other points you wanted to highlight?

12 MR. CRABILL: Yes, your Honor.

13 In connection with opposing counsel's claim that  
14 defendants continued to employ Mr. Jackson after his  
15 probationary period, the reality is is that the ACLU, Ms. Tian,  
16 they decided to demote Mr. Jackson, and that was in an effort  
17 to try to force him out. They didn't just demote him. They  
18 tried -- they demoted him four levels from where he was,  
19 slashed his salary in half, and presented him with an  
20 ultimatum: Either accept this demotion or you're fired. This  
21 wasn't a sort of charitable act, as it may being portrayed to  
22 be, and that could certainly be inferred from what's in the  
23 record by members of a jury.

24 There is also discussion about how the ACLU didn't  
25 discriminate against the other black men who complained, and

1 that also is not true. One of the people who Mr. Jackson  
2 complained was at Southern Convening Anwar Young. Anwar Young  
3 made a clear complaint that he was suffering discrimination at  
4 one of the affiliate offices in connection with what happened  
5 during the Southern Convening. And Mr. Jackson, as part of his  
6 further protected activities, brought those complaints to HR at  
7 Mr. Young's request.

8 So this wasn't some sort of disconnect between the  
9 ACLU national and ACLU affiliate. They are very much  
10 intertwined, especially at the HR level, and so there was  
11 discrimination and retaliation towards at least one other  
12 member of a group who complained during the Southern Convening.

13 For the two other gentlemen that opposing counsel  
14 mentioned, while they may have advanced at the ACLU, they  
15 weren't working under the Lucia Tian, who was the main driver  
16 of the discrimination and retaliation against Mr. Jackson.

17 Moving on to the discrimination claims, there was a  
18 discussion about the same act or inference, how there was --  
19 and discussion about the hiring committee and Ms. Tian's role.  
20 David Oliver's declaration, which was provided in support of  
21 Mr. Jackson, very clearly outlines that there was this  
22 committee put together to hire for this new special-projects  
23 lead role and that the committee members, including Mr. Oliver  
24 and some of the other members who had been at the ACLU, even  
25 predating Ms. Tian, saw the opportunity to add more diversity

1 to the ACLU with the hire and also add someone who was not a  
2 technical employee. They had enough data scientists. They had  
3 enough data analysts. They needed someone who could work  
4 between the group and the ACLU's other offices in order to  
5 facilitate projects.

6 So in his declaration, and likely testimony at trial,  
7 he mentioned that Tian had very different desires on who to  
8 hire and that ultimately while it was the group decision in  
9 hiring Mr. Jackson, Ms. Tian had a different preference and it  
10 wasn't for Mr. Jackson.

11 THE COURT: Was Oliver deposed?

12 MR. CRABILL: Oliver was deposed, yes.

13 THE COURT: The statements you're mentioning, are they  
14 in a declaration or in his deposition?

15 MR. CRABILL: They are in his declaration, and I would  
16 need to check back to the deposition transcript to see exactly  
17 what was said in connection with those. I believe he was  
18 questioned on the statements that he made, but I would need to  
19 check back to see if it was also mentioned in his deposition.

20 THE COURT: So as I understand it, he says something  
21 like, Ms. Tian wanted someone with more technical experience,  
22 but doesn't indicate who, but ultimately agrees with the others  
23 that Mr. Jackson should be hired, right?

24 MR. CRABILL: Ultimately, yes. Against what she  
25 preferred, she followed the group's decision to hire

1 Mr. Jackson, that is correct.

2 THE COURT: But it was her decision. She was the  
3 boss, right?

4 MR. CRABILL: I believe she was the ultimate decision  
5 maker, yes.

6 THE COURT: Mr. Oliver, he doesn't testify about  
7 anything about the performance issues, does he?

8 MR. CRABILL: In connection with Mr. Jackson?

9 THE COURT: Yeah.

10 MR. CRABILL: I don't believe he did. He testified  
11 specifically about the change in behavior towards Mr. Jackson  
12 pre and post protected activities, but I don't believe that he  
13 commented on performance in either role or in connection with  
14 his projects.

15 THE COURT: Is the declaration you mentioned attached  
16 to your opposition?

17 MR. CRABILL: It is, your Honor. I can get you the  
18 exhibit number.

19 THE COURT: That's fine. I have them all here. I can  
20 find it.

21 MR. CRABILL: Exhibit F it is.

22 THE COURT: OK. Thanks.

23 MR. CRABILL: If we are looking at additional evidence  
24 that shows that this case should go to trial, one key point of  
25 evidence is Ms. Kelley's message in response to Rob's farewell

1 email.

2 In August of 2020, which was Mr. Jackson's last day at  
3 the ACLU, he sends an email about the discrimination and  
4 retaliation that he has been experiencing at the ACLU. He  
5 outlines it.

6 In response to that, Kelley sends a message, a Slack  
7 message, in which she admits -- let me just get the language --  
8 in which she, in part, mentions "I want to acknowledge that I  
9 completely understand why Rob shared what he did yesterday. I  
10 see the ways in which racism and white supremacy played a part  
11 in his experience here and how he was experiencing things  
12 differently than I was. I take responsibility for not  
13 exploring what was happening in the org, and especially around  
14 the Southern Convening, and have been reflecting on this a lot.  
15 I know there was real harm done, and there is no excuse for  
16 it."

17 Clearly, a jury could infer from this message that  
18 Kelley is acknowledging the racism, white supremacy,  
19 discrimination that Rob has been experiencing at the ACLU.

20 At that point she had been his supervisor for many  
21 months, six, seven months, since she had come on. She had been  
22 interacting with Tian the entire way in her management of Rob.  
23 Tian had a hand in that the entire time.

24 And so in response to his message and when she says,  
25 hey, listen, I've been discriminated against the entire time I

1 was here, Kelley is saying, yeah, I had a chance to, you know,  
2 be with Rob for many months now, and that's what happened to  
3 him. That certainly could be an inference that a jury makes  
4 and further evidence why this case should go to trial.

5 Further supporting that, Kelley, before she sends this  
6 message, confides in a coworker in private Slack messages, one  
7 on one, hey, listen, I'm thinking of sending this message.  
8 What do you think, basically? Right. And in those messages  
9 they discuss how Tian, Horowitz, the ACLU at large could be  
10 very upset by what she is sending. They talk about the  
11 ultimate HR question in which, by sending this message, do I  
12 put myself at risk for retaliation. There are very key pieces  
13 of evidence here that defendants might try to ignore or don't  
14 want to acknowledge at this point of the litigation, but, at  
15 the very least, should be presented to a jury.

16 THE COURT: Doesn't she explain in her deposition that  
17 she knew that sending a message like this expressing empathy  
18 for someone in Mr. Jackson's position and sort of acknowledging  
19 systemic racism, I guess, she knew HR wouldn't like it because  
20 it would show up in a plaintiff's brief, and here we are  
21 talking about it in a plaintiff's brief. Isn't that what she  
22 was talking about?

23 MR. CRABILL: She could have been, or the inference  
24 based on the additional evidence in the case could be that she  
25 was acknowledging the discrimination and retaliation that he

1 experienced at the ACLU, right.

2           The fact that she testified after the lawsuit has been  
3 filed about what she claims her intent was is certainly  
4 something to be examined by the jury. How credible is that.  
5 She made these statements never thinking -- thinking maybe they  
6 could be part of a lawsuit, but certainly doing them -- at  
7 least the ones with her colleague, Brooke Madubunwu, in  
8 private Slack messages.

9           Let's let a jury decide what intent she had and what  
10 her credibility is in her deposition testimony.

11           THE COURT: She was his boss and recommended that he  
12 be terminated, right?

13           MR. CRABILL: She ultimately, in collaboration with  
14 Tian and others, ultimately decided that he should not pass the  
15 probation period related to the data analyst position, but very  
16 much that was Tian's final decision.

17           If you're looking at the statement that I just  
18 referenced, she is acknowledging her own failures in mentoring  
19 him and essentially saying I wish I had done more, I wish I had  
20 been more racially literate to understand what was happening to  
21 Rob so I could be a better supervisor.

22           It could be argued to a jury that she understood  
23 exactly what was going on in terms of what Tian's ultimate  
24 motivation was in trying to drive Rob out of the ACLU and, for  
25 those reasons, had to go along with what she understood to be



1 Tian's desire.

2 THE COURT: Thank you.

3 Anything else?

4 MR. CRABILL: Nothing from plaintiff, your Honor.

5 THE COURT: Ms. Coyne, anything you would like to  
6 reply to?

7 And specifically I wonder if you could address the  
8 comment that plaintiff's counsel made about the sprung  
9 deadlines and Ms. Bonfanti sort of springing those deadlines on  
10 him so that he was essentially -- it was her fault that he was  
11 behind and not anything relating to his own performance.

12 MS. COYNE: Yes. Thank you, your Honor.

13 So, first off, as I said at the very outset of my  
14 argument, that's arguing around not fair or, it shouldn't have  
15 been that way. Those are not within the purview of the Court  
16 to say whether or not the deadlines were fair, were they real  
17 deadlines, could they have been moved.

18 And I want to refer back to something your Honor  
19 raised a question about, which is evidence of the performance  
20 issues before the Southern Convening. If we go back, he starts  
21 in October. The Southern Convening is December 13. That there  
22 is any evidence of poor performance for somebody that's been  
23 there just two months is somewhat surprising, but that's how  
24 bad it is.

25 And you referenced Slack messages. There are Slack

1 messages that Ms. Tian sends to Mr. Jackson. It's Exhibit 19  
2 of my declaration where she is saying, hey, what's going on  
3 with this? I haven't heard from you. And it's in that  
4 exchange that he says, I recognize this isn't great performance  
5 or good performance from me.

6 So the fact that there is those indications even that  
7 early into somebody's employment -- again, we are talking about  
8 a very truncated period of time. To say it wasn't fair or it  
9 was really Karolyn Bonfanti's fault is about arguing around  
10 whether we were fair or whether the decisions that we made  
11 about judging his performance were correct ones.

12 Secondly, I want to reference a couple of other points  
13 on that. Mr. Crabill mentioned that there are coworkers who  
14 said that his treatment changed. I believe Mr. Crabill is  
15 referencing David Oliver. This is reference in our papers. He  
16 cites to Mr. Oliver's deposition, pages 151 to 154, for that  
17 sweeping conclusion.

18 Mr. Oliver -- and there is a reason why he cites to  
19 three pages, because there is a long back and forth about,  
20 well, there was some meeting, and Rob said something about  
21 something, and she said something about, take this off line.  
22 And when I questioned him about other occasions where something  
23 like that happened, he specifically says no, he can't remember  
24 any. To just say, well, there is coworkers who say, you really  
25 have to look at those pages in Mr. Oliver's testimony.

1           Mr. Crabill also mentioned Anwar Young. Mr. Young was  
2 not an employee of the ACLU national. The two people that we  
3 referenced who were treated favorably after the Southern  
4 Convening are employees of the national entity, the ACLU, as  
5 opposed to one of its affiliates. The ACLU doesn't control the  
6 employment of those folks.

7           If I can also refer to a couple of points on the  
8 discrimination piece. Again, Mr. Oliver was deposed about  
9 whose decision it was and whether there was some majority rule.  
10 That's on pages 110 to 111 of his deposition. He doesn't  
11 support the notion that it had some majority rule to it.

12           As Mr. Crabill has already acknowledged just moments  
13 ago, Ms. Tian was ultimately the decision maker with respect to  
14 the termination, so we think we have got a very clear  
15 same-actor inference here.

16           Also, Mr. Crabill again selectively quotes from that  
17 Allison Kelley message. So if you want to sort of say, well,  
18 this is what she must have meant, we know what she meant  
19 because she goes on to say that she feels a lot of anger at how  
20 Mr. Jackson has portrayed the situation and changed the  
21 narrative, and how she is hurt specifically for Lucia, who  
22 advocated for Rob more than anyone. Mr. Crabill doesn't  
23 reference that in his brief or here today, but in terms of that  
24 message, that's what she refers to. She specifically is  
25 calling out her view that Ms. Tian advocated for Rob more than

1 anybody else did.

2           Finally, you are correct, of course, your Honor, that  
3 Ms. Kelley testified about having sort of spoken without  
4 approval from HR about the circumstances of Mr. Jackson's  
5 employment. To say she was afraid of retaliation or something  
6 is made up out of whole cloth.

7           MR. CRABILL: Your Honor, if I can just respond.

8           THE COURT: Before you do, just one quick follow-up.

9           I want to go back to the issue of performance again.  
10 I guess I am just wondering. Other than the Slack message that  
11 you mentioned, Exhibit 19, that you rely on, which is  
12 Mr. Jackson saying something about his own performance on the  
13 project, or whatever it was about his performance. Then there  
14 is a reference later, like in January, about Mr. Horowitz  
15 saying, well, was it partly the delay of Bonfanti? And  
16 Ms. Tian saying, well, no. It's the performance thing.

17           Is there other stuff in between, sort of  
18 contemporaneous evidence that they at the time, in that  
19 October, November, December period, that they had issues with  
20 performance? Are there other Slack messages either between  
21 Horowitz and Tian or other evidence besides those sort of  
22 couple of circumstantial data points?

23           MS. COYNE: I believe before the Southern Convening  
24 it's the messages that are at Exhibit 19, which are a series of  
25 messages, not just one.

1 As I said, he has been there a month. So the fact  
2 that his supervisor is saying, hey, what's going on with this,  
3 can you send me what you have, I haven't heard from you for a  
4 few days, can you sign into the meeting, for an employee who  
5 has been there for a month is a lot in terms of performance.  
6 Yeah, it's the messages that are Exhibit 19 of my declaration.

7 THE COURT: Thank you.

8 Mr. Crabill.

9 MR. CRABILL: Sure.

10 First, to go back to your Honor's initial follow-up  
11 question around the Bonfanti situation in connection with the  
12 work-study project and the deadlines. It's not a situation  
13 about whether the work-study report, whether the graphs were  
14 correct, whether the numbers were right. It's about the way in  
15 which Mr. Jackson was treated compared to other people who were  
16 clearly -- or at least Ms. Bonfanti clearly demonstrating not  
17 the greatest performance, right. She is not letting  
18 Mr. Jackson know about a deadline that he is supposed to know  
19 about. She at this time, leading up to late January 2020, she  
20 is scrambling to get survey responses, which she is supposed to  
21 be responsible for.

22 If you look even to Slack messages between  
23 Mr. Horowitz and Mr. Jackson from May of 2020, Mr. Horowitz is  
24 still working on the work-study project, and he's working with  
25 Bonfanti, and he is critical, to say the least, of

Ms. Bonfanti's work and, frankly, his wanting to work with her.

This was a project that was the first time that the analytics department was helping with this project. Prior to 2019, 2020, the analytics department didn't do this. Bonfanti was doing this on her own, and they had to use what she had gathered over several years to help put this report together.

And so Bonfanti is dropping the ball, Horowitz is acknowledging the difficulties with Bonfanti and how that may have contributed to what was happening back in January. And so it's not about, oh, you know, the work-study report should have been this way and not this way and related to the arguments that opposing counsel is making. It's about how is he being treated differently than other people who may have had a hand in what was not going right with the work-study project at that time.

Tellingly, the decision to terminate Mr. Jackson is made, Tian is going to her supervisors and saying, hey, let's give an extension to Horowitz to finish this project, to finish the technical parts of this project.

Horowitz was the technical guy. Horowitz is the coding guy. That's the reason he was hired. If you have a problem with something technical or coding, you go to Horowitz, right, and it took him additional time to complete the project, and then he was still working on it months later.

The idea that the circumstances around the work-study

1 project are somehow not relevant, because it supposedly is  
2 criticizing what the ACLU's assessment of his work was, is just  
3 not accurate. The evidence is showing that this opportunity  
4 was used as a way to get the squeaky wheel out of the ACLU,  
5 which eventually defendants did.

6 MS. COYNE: Your Honor, if I may.

7 THE COURT: Yes.

8 MS. COYNE: To be clear, again, I think that was just  
9 an argument about thinking we did the project wrong or should  
10 have been handled differently. But from a legal perspective,  
11 if Mr. Crabill is suggesting that Ms. Bonfanti was treated more  
12 favorably, she is not similarly situated to the plaintiff  
13 anyway. She is in finance. She didn't report to Ms. Tian. So  
14 whether she should have done it differently or her deadlines  
15 were wrong or something is of no consequence.

16 Mr. Horowitz is also not similarly situated to the  
17 plaintiff. And the fact that Mr. Horowitz was working on it  
18 was because the plaintiff didn't finish it.

19 In any case, they are not similarly situated to the  
20 plaintiff in terms of being comparators.

21 THE COURT: I think his argument is that it goes to  
22 pretext; in other words, the idea that she was kind of looking  
23 for problems with his work and saying, oh, he's clearly in  
24 above his head, etc., etc., when in fact it was this other  
25 person who was causing the delays, and that sort of goes to the

1 idea that she really was annoyed with him because he was a  
2 troublemaker, and he was complaining about the issues from the  
3 Southern Convening, and she was looking to nitpick.

4 MS. COYNE: That's exactly why, as I said before, it's  
5 not about -- that's why the Court doesn't get into decisions  
6 about whether or not we are handling our projects properly and  
7 whether Karolyn Bonfanti moved the deadline or it was really  
8 her fault or not. That's what this is all about is, I don't  
9 think -- Mr. Crabill just said, they used to do the project  
10 differently. They are entitled to make those decisions.

11 Whether or not there is evidence of pretext is the question.

12 And the fact that somebody may look at it and say,  
13 well, the deadline should have been different, and Mr. Horowitz  
14 really should have been assigned the project from the beginning  
15 is outside the Court's purview. That's not evidence of  
16 pretext.

17 THE COURT: Unless it suggests that she is lying,  
18 right. If it undermines the credibility or the genuineness of  
19 her performance, stated performance concerns, that is what  
20 pretext is, right?

21 MS. COYNE: Understood. But as we have already  
22 pointed out, these were ongoing problems since before the  
23 Southern Convening even happened.

24 THE COURT: And I'm asking, what evidence is there for  
25 that other than the one message from him saying, sorry I'm



1 late, this isn't my best performance. Is there more?

2 MS. COYNE: There are those messages as well as  
3 Ms. Tian's testimony about what was going on, which was cited  
4 in the briefs as well.

5 MR. CRABILL: Your Honor, if I could just respond to  
6 that point.

7 If you're looking at the email exchanges between Tian,  
8 Bonfanti, and Mr. Jackson in connection with the first phase of  
9 the work-study project, it is painting a very different picture  
10 about what his performance is, and ultimately his performance  
11 over weeks, not just one or two messages that are being  
12 referenced here about the survey and how it was -- I can get  
13 the direct language, but how it was great, being praised for  
14 that ultimate good performance in connection with that phase of  
15 the project. It is very, very clear that all of that was  
16 happening before the Southern Convening and the protected  
17 activities.

18 Going to the discrimination claims, it's clear that  
19 Tian had race on her mind. She had race on her mind in  
20 connection with Mr. Jackson and what he was doing. That is why  
21 I believe in the spring of 2020 she had messages with Horowitz  
22 around what Mr. Jackson was continuing to speak out about, what  
23 happened to him in connection with the demotion, and she had  
24 very -- she had Slack messages with him where she had, hey, I  
25 want to protect you, and then she removed that conversation --

1 she didn't delete it. She moved to a different conversation  
2 text messages, most likely because she thought it would be an  
3 even more private place than the Slack messages, and said, hey,  
4 I wanted to protect you because you're a white guy. I wanted  
5 to protect you, because you're a white man, from this black  
6 person who is making these complaints. That's certainly an  
7 inference that could be made by a jury.

8 And the ACLU's reply papers, they even admit that the  
9 ACLU apparently has this sort -- has this culture where maybe  
10 minority or nonwhite employees are going to maybe jump the gun  
11 or jump the gun about attacking white employees for  
12 discrimination.

13 It's clear that race was on Tian's mind throughout the  
14 relevant events of this case.

15 MS. COYNE: Your Honor, can I just respond to that  
16 point alone?

17 THE COURT: Sure.

18 MS. COYNE: That's not at all what that message says.  
19 There is no reference to it being about Mr. Jackson's protected  
20 activity. That's also the language that Mr. Crabill uses in  
21 his brief. He says it's in response to plaintiff's protected  
22 activity. There is absolutely no support for that whatsoever.

23 This message comes five months later, in May. It  
24 doesn't have anything to do or reference any protected activity  
25 by the plaintiff.

1           What the discussion is about is how to handle the team  
2 morale about Mr. Jackson's upcoming termination and about how  
3 they are going to communicate that decision. To then say it's  
4 about his protected activity or she has race on her mind is not  
5 supported at all by the message.

6           THE COURT: OK. I understand.

7           Just to be clear, I had asked about kind of the  
8 evidence of the performance issues, and I know there is  
9 deposition testimony by Ms. Tian explaining it, and I assume  
10 also Horowitz and Kelley perhaps as well.

11           You mentioned Exhibit 19. Is Exhibit 19 the one place  
12 where I would find the evidence before the Southern Convening  
13 that existed at the time?

14           MS. COYNE: That's right, your Honor, along with the  
15 testimony.

16           THE COURT: Great. Thank you.

17           I think you've answered all of my questions. I  
18 appreciate it. That's helpful.

19           Anything else?

20           I can't give you a date yet when I am going to rule,  
21 but this is helpful.

22           I would appreciate having the transcript. If you can  
23 order it, that would be great. If you go to the Southern  
24 District website, you go to the menu at the upper right corner  
25 and go to trial support, it tells you how to order the

1 transcript.

2 Anything else, Mr. Crabill?

3 MR. CRABILL: Nothing from us, your Honor.

4 THE COURT: Ms. Coyne.

5 MS. COYNE: No, your Honor. Thank you.

6 THE COURT: Thanks, everyone. We are adjourned. Bye  
7 now.

8 (Adjourned)

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